Supreme Court, U.S.
FILED

03-1426 APR 12 2004

In The
Supreme Court of the United States

DEKALB COUNTY,

Petitioner,

v.

CHRISTOPHER D. PRICKETT, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals wrongly held that § 216(b) of the Fair Labor Standards Act allows named plaintiffs to add unrelated, new claims to an existing FLSA class action lawsuit, thereby binding the class members to any judgment rendered with regard to these new claims, without informing or obtaining the consent of the class members?

LIST OF PARTIES

Respondents/Plaintiffs:

The following are named Plaintiffs in this action:

Donald A. Cox
Joseph M. Hines
Walter B. Johnson
Christopher D. Prickett
Robert L. Robertson

The following are purported class member Plaintiffs to this action, who filed consent forms, pursuant to § 216(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b), with regard to the initial Complaint, filed on November 10, 1997:

James K. Adams
Stig T. Ahlenius
Thomas L. Alden, Sr.
Carl E. Alexander
David Anderson
Stephen C. Andrews
Vernon Armstead
Major L. Arnold
Warren Arnold, Jr.
John Ashcraft
Paul A. Askew, Jr.
Dennis G. Atchley
David Atkins
Jerome Atkinson
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Tony Lamar Baker
James A. Ball
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Victor D. Barnett
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Noel G. Bennett
Walter L. Berry
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Sell Caldwell, III
Mayo Cammings
Jerry B. Campbell
Geoffrey L. Casteel
Edwin Cliff Castleberry
Eric S. Catron
Kenneth L. Charles
Eric Wayne Chastain
Billy E. Clark
Lesley B. Clark
Melvin Clemons
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Kim B. Cochran
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Marcus A. Warren
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John W. Webster
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Vincent D. Zellars
Paul A. Zurbrugg
Frank L. Zwald

Petitioner/Defendant:

DeKalb County, Georgia

There is no parent or subsidiary company of any party to be listed.

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PETITION FOR WRIT OF CERTIORARI

Petitioner DeKalb County, Georgia respectfully petitions for a writ of certiorari for review of the opinion judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 349 F.3d 1294 and is reprinted in the Appendix ("App.") filed herewith at App. A, 1a. The Table Opinion of the Court of Appeals denying DeKalb County's Petition for Rehearing and Rehearing en Banc appears at ___ F.3d ___ (TABLE NO. 03-11774-CC) and is reprinted at App. D, 25a. The decision of the District Court granting DeKalb County's motion for summary judgment is reported at 276 F.Supp.2d 1265 and is reprinted at App. C, 14a. The unreported decision of the District Court denying Respondents' motion for reconsideration of the District Court's grant of summary judgment to DeKalb County is reprinted at App. B, 7a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment reversing the District Court's decision in favor of Petitioner DeKalb County on November 5, 2003 and denied DeKalb County's Petition for Rehearing and Rehearing en Banc on January 12, 2003. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This appeal involves the proper interpretation of § 216(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b), which provides, *"[a]n action to recover the liability prescribed [in this section] may be maintained . . . by any one or more employees for and in behalf of himself or themselves and any other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought."*

STATEMENT OF THE CASE

On November 10, 1997, named Plaintiffs Prickett, Cox, Robertson, Hines, and Johnson, who were or are DeKalb County, Georgia firefighters, filed suit alleging that DeKalb County improperly subjected them to the Fair Labor Standards Act's partial overtime exemption for firefighters because they devoted too large a percentage of their time to non-fire protection activities such as emergency medical services.[1] (App. F, 29a-39a). Plaintiffs also

[1] The FLSA states that employees must be paid overtime if they work more than 40 hours in a 7-day work period, unless an exemption applies. 29 U.S.C. § 207(a)(1). Section 207(k) of the FLSA provides a partial overtime exemption for firefighters. Under this § 207(k) exemption, local governments may elect to pay firefighters overtime only if they work more than 212 hours in a 28-day work period (or, averaged out in layman's terms, work more than 53 hours per week). 29 U.S.C. § 207(k). However, this § 207(k) exemption is available only for employees engaged in "fire protection activities." *Id.* Related Department of

(Continued on following page)

alleged in this Complaint that DeKalb County improperly classified Fire Captains and Battalion Chiefs as FLSA-exempt managerial employees and therefore, according to Plaintiffs, such employees were owed overtime. (*Id.*). In conjunction with this lawsuit, numerous DeKalb County firefighters (hereinafter "class members") filed signed consent forms authorizing the named Plaintiffs to pursue these claims on their behalf. (App. C, 15a). The class members filed these consent forms because § 216(b) of the Fair Labor Standards Act ("FLSA") states that any similarly situated employee who wishes to become a class member must opt-in to the class by filing with the court a written consent to representation. 29 U.S.C. § 216(b). (App. C, 15a).

On April 9, 1998, a tornado hit the Dunwoody area of DeKalb County, Georgia, causing major damage. (App. C, 15a). This damage required a vast effort from the DeKalb County Fire Department, and DeKalb County required many firefighters to work extra hours in an effort to stem the damage caused by the tornado. (*Id.*). Shortly after the tornado struck, former DeKalb County Fire Chief Carlos Perez issued a memorandum that stated, for a one-week

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Labor regulations further provide that employees are not engaged in fire protection activities for purposes of the § 207(k) exemption if they devote less than 80% (or, conversely, more than 20%) of their working time to non-fire protection activities (the "80/20 Rule"). 29 C.F.R. § 553.212(a). Plaintiffs argued that they were not engaged in "fire protection activities", and thus not subject to the § 207(k) exemption, because they spent too much of their working time engaged in emergency medical duties. (App. F, 35a-36a).

period, all 24-hour shift personnel[2] would be placed on a "40 hour work week/12 hour shifts." (*Id.*).

In July of 1998, the named Plaintiffs amended the Complaint to add a new claim that Chief Perez's memorandum had the effect of temporarily suspending the § 207(k) exemption for this one-week tornado period and, therefore, they were entitled to extra overtime for all hours worked over forty during this week-long period (hereinafter "tornado claim").[3] (App. G, 40a-43a). However, no class members filed consent forms opting into this entirely new tornado claim, which was unrelated to the prior asserted claims in this action. (App. C, 19a-20a).

After completion of discovery, DeKalb County moved for summary judgment as to all claims, including the extra overtime tornado claim. (App. C, 16a). The District Court granted the County's motion and dismissed all claims. (*Id.*). Plaintiffs appealed to the Eleventh Circuit Court of Appeals. (*Id.*) The Eleventh Circuit affirmed the dismissal of all claims contained in the original Complaint, holding that DeKalb County properly had adopted the § 207(k) partial overtime exemption and that Captains and Battalion Chiefs were FLSA-exempt managerial employees, but denied summary judgment as to the later-added tornado claim. (App. C, 16a-17a). Thus, the tornado claim alone

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[2] In DeKalb County, firefighters typically work for 24 hours and then have the next 48 hours off.

[3] It is important to note, and it is undisputed, that DeKalb County paid the firefighters all the overtime they were entitled to under the § 207(k) exemption for this tornado period. Thus, the dispute here is that the Plaintiff firefighters seek *extra* overtime, over and above that authorized by the FLSA for firefighters pursuant to § 207(k).

was remanded back to the District Court for further action. (*Id.*).

The District Court reopened discovery and allowed both parties to again move for summary judgment as to the sole remaining tornado claim. (App. C, 17a). DeKalb County moved for summary judgment, arguing, in part, that because none of the class members opted-into this new tornado claim as required by § 216(b) of the FLSA, they were not parties to this claim and should be dismissed from this action. (App. C, 18a-21a). Plaintiffs cursorily responded to DeKalb County's argument by stating merely that Defendant's position was "absurd" and "ridiculous," was contrary to the liberal construction of the FLSA, and, other than quoting § 216(b), Plaintiffs cited to no law or authority whatsoever. (App. B, 10a). By Order dated February 4, 2003, the District Court granted DeKalb County's motion for summary judgment on this issue and dismissed from this action all purported class members, leaving only the five named Plaintiffs in the case. (App. C, 18a-21a).

Plaintiffs then moved for reconsideration, raising for the first time numerous (albeit incorrect) legal and factual arguments that they did not previously raise in response to Defendant's motion for summary judgment. (App. B, 11a-13a). The District Court denied Plaintiffs' motion for reconsideration. (App. B, 13a).

Upon Plaintiffs' request, and without objection by Defendant, pursuant to FED. R. CIV. P. 54(b), the Court certified for immediate appellate review the issue of whether the class members properly were dismissed from this action because they did not opt-in to the tornado claim as required by the FLSA. (App. C, 13a). Plaintiffs thereafter

appealed. After briefing by both parties, on November 5, 2003, the Eleventh Circuit Court of Appeals reversed the District Court's grant of summary judgment to DeKalb County and reinstated the extra overtime tornado claim. (App. A, 6a). DeKalb County petitioned for rehearing and rehearing en banc, which was denied on January 12, 2004. (App. D, 25a-26a).

REASONS FOR GRANTING CERTIORARI ARE SUBSTANTIAL

This Petition presents the important first impression issue of the proper statutory interpretation of the class action consent requirement of the Fair Labor Standards Act as it relates to amended complaints. To Petitioner's knowledge, neither this Court nor any Court of Appeals previously has directly addressed this issue and therefore this Petition meets the requirement of SUP. CT. R. 10(c) because it presents an important issue of federal law that this Court should resolve.

Section 216(b) of the FLSA governs class actions under the FLSA. Section 216(b) states that, while named plaintiffs may bring class action lawsuits on behalf of others similarly situated, no person can become a class member plaintiff in such a lawsuit unless he affirmatively opts-in to the case by filing with the court a written consent to be a class member. 29 U.S.C. § 216(b). However, § 216(b) does not specifically address the important question that has arisen in this action: Whether a person who filed a written consent to be a class member in a lawsuit asserting specific FLSA claims also must file a written consent to be a class member for new, unrelated

FLSA claims that are later added to the lawsuit by the named plaintiffs without the specific consent (or perhaps even knowledge) of the class members. Or, more simply put, having obtained the written consent of class members to pursue a specific FLSA claim, do named plaintiffs have *carte blanche* to add new, unrelated FLSA claims, thereby binding the class members to any judgment with regard to the newly added claims, without obtaining any further consent from the class members? DeKalb County contends that the FLSA should not be read to allow such a practice, but rather should be interpreted straightforwardly to mean that class members must consent to *all* claims brought on their behalf, not just some. To hold otherwise largely would make meaningless the opt-in consent requirement of § 216(b), unlawfully would convert FLSA class actions into FED. R. CIV. P. 23 class actions whereby plaintiffs are required to opt-out as opposed to opt-in as required by the FLSA, would create confusion regarding the identity of the actual plaintiffs in such actions, unfairly could expose certain unknowing class members, who never expressly consented to a new claim being brought on their behalf, to adverse judgments, and could enable class members to avoid the applicable statute of limitations.

Accordingly, Petitioner DeKalb County respectfully asks that the Court grant certiorari and reverse the judgment of the Court of Appeals.

I. THE PURPORTED CLASS MEMBERS ARE NOT PARTIES TO THIS ACTION BECAUSE THEY DID NOT CONSENT TO THE TORNADO CLAIM AS REQUIRED BY § 216(b) OF THE FLSA.

The named Plaintiffs have styled this case as a "Fair Labor Standards Act Class Action." (App. F, 29a). However, unlike a typical class action under Rule 23 of the Federal Rules of Civil Procedure (in which persons are deemed to be class members, and bound by the judgment, unless they affirmatively opt-out), the FLSA states that any similarly situated employee who wishes to become a class member must opt-in to the class by filing with the court a written consent to representation. 29 U.S.C. § 216(b); *Hoffman-La Roche, Inc. v. Sperling*, 493 U.S. 165, 167-68, 110 S.Ct. 482, 485 (1989); *Cameron-Grant v. Maxim Healthcare Services, Inc.*, 347 F.3d 1240, 1248 (11th Cir. 2003); *Haynes v. Singer Co.*, 696 F.2d 884, 886 (11th Cir. 1983). Without such written, filed consent, "no person can become a party plaintiff and no person will be bound by or may benefit from a judgment." *Haynes*, 696 F.2d at 886; *LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 288 (5th Cir. 1975).

The issue presented to this Court, and what no court prior to the instant Court of Appeals' judgment previously has addressed, is whether class member consent, once given, extends to claims later added by the named plaintiffs unilaterally, without the written consent (or perhaps even knowledge) of the class members? DeKalb County respectfully contends that the relevant authority cited below, and the requirement that FLSA class actions be "collective" as opposed to "representational," mandates an answer in the negative.

A. Section 216(b) requires the knowing participation of the class members.

Unlike a Rule 23 class action, in which named plaintiffs may bring claims on behalf of others without their knowledge, the opt-in language of § 216(b) was designed to "prevent large group actions . . . from being brought on behalf of employees who had no real involvement in, or knowledge of, the lawsuit." *Cameron-Grant*, 347 F.3d at 1248, citing *United Food & Commercial Workers Union v. Albertson's, Inc.*, 207 F.3d 1193, 1200 (10th Cir. 2000). "The consent in writing requirement sought to eradicate the problem of totally uninvolved employees gaining recovery as a result of some third party's action in filing suit." *Cameron-Grant*, 347 F.3d at 1248, citing *Arrington v. Nat'l Broadcasting Co., Inc.*, 531 F.Supp. 498, 502 (D.D.C. 1982). FLSA class actions therefore differ fundamentally from those brought under FED R. CIV. P. 23 because Rule 23 class actions do not depend upon the participation of other class members, and class members are bound by the judgment irrespective of whether they take any role in the action. *LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 288 (5th Cir. 1975). FLSA class actions, to the contrary, "prohibit what precisely is advanced under Rule 23 – a representative plaintiff filing an action that potentially may generate liability in favor of uninvolved class members." *Cameron-Grant*, 347 F.3d at 1248-49. Therefore, unlike the "representational" class actions allowed by Rule 23, FLSA class actions are "collective" and therefore "depend on the active participation of other plaintiffs," manifested by their filed, written consent. *Id.*; *see also, Hoffman-La Roche, Inc. v. Sperling*, 493 U.S. 165, 170, 110 S.Ct. 482, 486 (1989) (§ 216(b) actions are collective).

B. The purported class members did not knowingly participate in, or give their consent to be a part of, the later-added tornado claim.

In the instant action, roughly 420 firefighters filed consent forms to be represented in the specific claims listed in the initial Complaint. (App. C, 15a). Plainly, when the class members filed their respective consent forms, the tornado claim was not a part of the Complaint because the tornado crisis had not occurred. (App. C, 19a). Further, the tornado claim is not a natural extension of the claims brought in the initial Complaint, but instead is an entirely separate and discrete claim, based upon a wholly different and unrelated set of facts. (App. C, 20a)

As properly held by the District Court (and not disputed by the Court of Appeals), there is no connecting factual or legal link between the original claims (for which the class members filed consent forms) and the later-accruing tornado claim (for which they did not). This is not a case where the named Plaintiffs amended the Complaint merely to add an alternative legal theory or argument stemming from existing facts or claims. (App. F, 29a-39a; App. G, 40a-43a). Rather, in the instant case, the named Plaintiffs added an entirely new claim (which could not be foreseen at the time of the initial Complaint) based upon wholly unrelated facts.[4] (*Id.*). Indeed, the very fact that

[4] As noted above, the initial Complaint alleged that DeKalb County improperly adopted the FLSA's § 207(k) partial overtime exemption for firefighters because, according to Plaintiffs, the firefighters devoted too much of their time to non-fire protection related activities, principally emergency medical services. The tornado claim, by contrast, does not challenge whether DeKalb County lawfully adopted the § 207(k)

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this lone tornado claim survived summary judgment, despite the dismissal of all other claims, confirms that it is independent and unrelated to any other claim.

The Plaintiffs cannot show that this is a "collective" action as required by the FLSA because the Plaintiffs have put forth no evidence whatsoever that the purported class members knowingly participated in this action. (App. C, 20a-21a). To the contrary, the record itself conclusively establishes such an allegation to be impossible for the simple reason that at least some class members did not even know that the named Plaintiffs had added the tornado claim until long after the fact. For example, on May 24, 1999, over a year after the tornado hit Dunwoody, and nearly a year after the addition of the tornado claim, purported class member Bruce Koshkin testified as follows:

> *Q: Are you aware that the complaint was amended in this case to include allegations concerning pay regarding time worked during the tornado aftermath in 1998?*
>
> *A: I didn't that – no, sir, I didn't know it was part of the lawsuit. I had heard rumors. I didn't know officially that it was.*

(App. D, 28a). Thus, out of the relatively small number of depositions taken in this case (given the large number of

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exemption, nor does it claim that the work performed by firefighters in response to the tornados was unrelated to fire protection activities. (App. G, 40a-43a). Rather, the tornado claim alleges solely that Fire Chief Carlos Perez's memorandum, issued shortly after the tornados struck Dunwoody, Georgia, temporarily placed the firefighters on a 40-hour workweek for overtime purposes. (*Id.*).

class members), it is proven that there is at least one class member who did not even know there was a tornado claim. One cannot be a knowing, participatory member of a "collective" action of which he is unaware.[5] Simply put, there is no evidence that any class member expressed a willingness to be bound by the outcome of, or to participate in, the tornado claim. Therefore, the class members did not satisfy the opt-in requirement of § 216(b) and properly were dismissed from the tornado claim.

II. THE COURT OF APPEALS' DISTINCTION BETWEEN "ACTION" AND "CLAIM" IS MISPLACED.

The Court of Appeals incorrectly interprets § 216(b) to mean that the consent requirement attaches to overall "actions" not individual "claims." (App. A, 4a). Thus, according to the Court of Appeals, named plaintiffs theoretically need only obtain consent for one claim. Once having obtained this consent, named plaintiffs thereafter may add as many unrelated claims as they please without obtaining the consent of those persons on whose behalf these claims are brought, so long as such claims are added, not as new lawsuits, but via amended complaint. This interpretation not only contradicts the purpose of the consent requirement of § 216(b), but also invites cynical abuse.

Under § 216(b), named plaintiffs may not pursue "collective" class action lawsuits on behalf of others

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[5] Moreover, if the class members truly were fully participating plaintiffs, it would be improper to instigate a new claim on their behalf without their knowledge or express consent, which clearly happened with Bruce Koshkin.

without their consent. *Cameron-Grant v. Maxim Healthcare Services, Inc.*, 347 F.3d 1240, 1248 (11th Cir. 2003). As shown above, the tornado claim is wholly separate and unrelated to the claims to which the class members consented to representation. Had the named Plaintiffs brought the tornado claim as a separate lawsuit, there could be no dispute that the FLSA would require new consent forms for this claim. However, the fact that the named Plaintiffs chose to amend an existing complaint to add this unrelated tornado claim, rather than bring a new lawsuit, should not relieve them of the obligation to gain the consent of class members to bring this new action on their behalf. More directly stated, § 216(b) should not be interpreted to allow named plaintiffs to use the procedural mechanism of amending a complaint to avoid having to obtain the consent of class members to bring new claims on their behalf.

III. THE CONSENT FORMS FILED BY THE CLASS MEMBERS DID NOT AUTHORIZE THE NAMED PLAINTIFFS TO ADD UNFORESEEN, UNRELATED FUTURE CLAIMS.

The Court of Appeals incorrectly held that the actual consent forms filed in this action regarding the initial Complaint specifically permitted the named plaintiffs to bring future, unrelated claims on behalf of the class members.[6] (App. A, 5a). This holding is incorrect because

[6] The Court of Appeals also held that the class members did not need to file additional written consents to be a part of the tornado claim because they are "party plaintiffs" and thus "[do not] have a lesser status than [the] named plaintiffs." (App. A, 4a). However, because class

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the consent form used in this action merely authorized the named Plaintiffs to represent the class members' "claims for overtime compensation."[7] (App. A, 5a). This consent form nowhere states that the named Plaintiffs may bring future, unforeseen claims on their behalf. When the class members file their consent forms, there was no tornado claim. Thus, the consent form could not have authorized this claim, because, by its own terms, such was not a claim, nor was it expected to be a claim, when the class members consented to the initial Complaint. Moreover, the initial Complaint itself makes clear that the class member consent was limited to "this action" (as set forth in the initial Complaint) and nowhere states or implies that the consent forms were designed or believed to extend to future, unrelated claims. (App. G, 30a, 31a). It also is instructive that the Plaintiffs themselves did not argue before the District Court that the consent forms specifically authorized the class members to bring future claims on behalf of the class members, nor has there been any testimony from class members that they believed this consent form would cover future claims. Therefore, to the extent the Court of Appeals based its ruling on this factor, such is unsupported by the record and therefore is in error.

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members do not become plaintiffs in FLSA class action lawsuits unless they affirmatively opt-in by filing written consents with the court, the Court of Appeals' holding merely begs the question: for what claims have the class members actually consented to be plaintiffs? While DeKalb County does not dispute that the class members consented to the claims in the initial Complaint, there is no evidence whatsoever that any class member consented to the tornado claim.

[7] The consent form used in this action was identical for all class members, and is reprinted in its entirety at App. A, 5a.

IV. REQUIRING NEW CONSENT FORMS FOR THE TORNADO CLAIM WILL NOT ENCOURAGE MULTIPLE LAWSUITS.

The Court of Appeals also bases its judgment, in part, on the mistaken conclusion that requiring consent forms for the tornado claim would encourage multiple lawsuits by employees who failed to consent "in time" and, therefore, would be contrary to the intent of Congress in enacting § 216(b) because, according to the Court of Appeals, Congress enacted § 216(b) to decrease the number of FLSA lawsuits filed in federal court.

The Court of Appeals bases its judgment upon an incorrect understanding of the purpose of § 216(b). Congress added the opt-in language to § 216(b) in order to prevent union representatives from bringing large lawsuits on behalf of other employees without their knowledge or consent, a practice that was flooding the courts with FLSA class actions, and which threatened to bankrupt many companies. *See De Asencio v. Tyson Foods, Inc.*, 342 F.3d 301, 305-06 (3rd Cir. 2003); *United Food & Commercial Workers Union v. Albertson's, Inc.*, 207 F.3d 1193, 1200-01 (10th Cir. 2000); *Arrington v. Nat'l Broadcasting Co., Inc.*, 531 F.Supp. 498, 500-03 (D.D.C. 1982). Therefore, far from encouraging multiple lawsuits, the consent requirement serves to *reduce* the number and scope of class action lawsuits. Failing to apply this requirement to the tornado claim, in essence, would revive the disfavored practice of allowing "representatives" to bring claims on behalf of other employees without their consent.

Likewise, the Court of Appeals' concern that employees "who fail to file consents in time would be required to file new actions on their own behalf, [which would result] in the number of lawsuits necessary to litigate the same

end result [being] multiplied" also is misplaced. To the contrary, in the Eleventh Circuit, opt-in consent forms filed under § 216(b) do not relate back to the time of filing of the original complaint for statute of limitations purposes, and a plaintiff who does not opt-in before the expiration of the statute of limitations is time-barred. *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1106 (11th Cir. 1996). Thus, if an employee fails to opt-in to a class action within the statute of limitations, he may not pursue an individual claim; however, the employee may, any time up until the expiration of the statute of limitations, opt-in to the class action. *Id.* Therefore, far from encouraging lawsuits, adherance to the consent requirement of § 216(b) will *reduce* the number of parties bringing lawsuits.

The Court of Appeals' judgment perhaps is based in part on an unstated belief that requiring FLSA class members to file additional consent forms for every new variation of a class action lawsuit added by the named plaintiffs would be unwieldy and burdensome. DeKalb County grants that, in some cases, new consent forms may not be required, such as when named plaintiffs amend a complaint simply to add an alternative legal theory or argument stemming from existing facts or claims. In such a case, an argument legitimately could be made that such new claims were so closely related to the initial claims that the class members' consent to such amendments could be implied without further documentation. However, that is *not* the case presented to this Court. To the contrary, it *cannot* be implied that the class members consented to the tornado claim at the time of the initial Complaint because the tornado crisis had not yet occurred and was wholly unforeseen! Thus, the tornado claim is not a variation of an existing claim, and the class members were

required to file consent forms authorizing the named Plaintiffs to represent them on this entirely new and unexpected claim.

V. THE COURT OF APPEALS' DECISION WOULD IMPROPERLY CONVERT THIS ACTION INTO A RULE 23 CLASS ACTION WHEREBY PLAINTIFFS ARE REQUIRED TO OPT-OUT AS OPPOSED TO OPT-IN AS REQUIRED BY THE FLSA.

If the class members are not required to file consent forms for the tornado claim, then what of a class member like Bruce Koshkin, who was listed as a Plaintiff in the tornado claim without his knowledge? According to the Court of Appeals, class members, once consenting to a particular claim, would remain plaintiffs for other, later-accruing, unrelated claims whether they expressly consented or not. This "in for a foot, in for a mile" holding fails to recognize that § 216(b) of the FLSA, by requiring the filing of a written consent form as a prerequisite to becoming a class member, clearly mandates affirmative action on the part of a class members to manifest their intent to join the class and be bound by a judgment. *Cameron-Grant v. Maxim Healthcare Services, Inc.*, 347 F.3d 1240, 1248 (11th Cir. 2003); *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1106 (11th Cir. 1996). The Court of Appeals' decision, however, would allow putative plaintiffs *passively* to become class members to later-added, unrelated claims (like the tornado claim). Thus, the Court of Appeals *de facto* has transformed this action into a Rule 23 class action, whereby plaintiffs opt-out of a class action as opposed to opting-in as is required by the FLSA. Such a rule is unwarranted and against the clear weight of

authority, which holds that Rule 23 procedures are inappropriate for the prosecution of class actions under § 216(b). *E.g.*, *LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 289 (5th Cir. 1975); *Grayson*, 79 F.3d at 1106.

Lastly, individual employees legitimately may prefer *not* to be a part of a class action for later-arising, unrelated claims.[8] In this instance, § 216(b) fulfills the additional purpose of protecting such employees from unilaterally being made class member plaintiffs against their will. However, because the FLSA contains no express opt-out provision, the Court of Appeals' ruling will foster uncertainty and confusion regarding how a class member procedurally would opt-out of a lawsuit that added new claims he did not expressly consent to, especially if the plaintiff was not aware that such a claim had been added to the lawsuit. Therefore, allowing the named Plaintiffs to add the tornado claim on behalf of the class members without their express consent threatens the class members' important right to not be a part of such claim or to bring it themselves.

VI. THE COURT OF APPEALS' DECISION WOULD IMPROPERLY BIND EMPLOYEES TO ADVERSE JUDGMENTS FOR CLAIMS TO WHICH THEY DID NOT CONSENT.

As noted above, opt-in class members are bound by any judgment entered in the case, to the same extent as

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[8] Such employees may not want to be a part of such claims, or they may, for many legitimate reasons, wish to bring such claims on their own behalf.

the named plaintiffs. *Haynes v. Singer Co.*, 696 F.2d 884, 886 (11th Cir. 1983). It would be inequitable to bind an employee to a judgment for a claim he did not know he was a party to. Such an employee conceivably could be required to pay court costs and possibly attorney's fees, depending on the circumstances. The holding of the Court of Appeals would also create after-the-fact litigation regarding who was a plaintiff and, thus, who is bound by any adverse judgment that could require the class members to pay costs and attorney's fees. Again, filing consent forms, as required by § 216(b), would prevent such conflicts and greatly streamline the proceedings.

VII. THE COURT OF APPEALS' DECISION WOULD WRONGLY ALLOW CLASS MEMBERS TO AVOID THE STATUTE OF LIMITATIONS.

If the case ultimately resulted in a favorable disposition for the plaintiffs, a putative class member, who had not consented to the action and/or may not have known of its existence until after the expiration of the applicable statute of limitations, would receive an unjust enrichment because he could recover for a claim for which he would have been time-barred had he been required to affirmatively opt-in by filing a written consent with the court.

As noted above, in the Eleventh Circuit, opt-in consent forms filed under § 216(b) do not relate back to the time of filing of the original complaint for statute of limitations purposes, and a plaintiff who does not opt-in before the expiration of the statute of limitations is time-barred. *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1106 (11th Cir. 1996). However, this rule would be eroded were named plaintiffs allowed to add new, later-accruing claims,

without obtaining the express consent of the existing opt-in plaintiffs. In such cases, putative class members theoretically could recover a judgment, even though they took no action to assert (and did not even know about) the claim within the statute of limitations.

Inherent in the concept of a statute of limitations is the idea that a plaintiff must take affirmative action to assert a claim within a limited time period. The Court of Appeals' judgment undermines this important goal because it rewards *inaction*. Thus, the Court of Appeals' judgment *de facto* abolishes the statute of limitations for any subsequently-added claim because potential class members could, by not affirmatively opting-out, unofficially consent to later-added claims *after* the expiration of the statute of limitations.

Such a result would run contrary to the intent of Congress in enacting the opt-in requirement of § 216(b) because, "in discussing this amendment, Congress expressed the concern that an opt-in plaintiff should not be able to escape the statute of limitations bearing on his cause of action by claiming that the limitations period was tolled by the filing of the original complaint." *Grayson*, 79 F.3d at 1106, citing 93 Cong.Rec. 2,182 (1947). Thus, Congress expressed its desire that "only a written consent to opt-in will toll the statute of limitations on an opt-in plaintiff's cause of action. Accordingly, we conclude that a putative plaintiff must file his written consent to opt into the class action prior to the expiration of the statute of limitations ... A contrary ruling would ... virtually eliminate the statute of limitations for opt-in plaintiffs." *Grayson*, 79 F.3d at 1107. Therefore, the Court of Appeals' judgment conflicts with the legislative intent of the FLSA

and wrongly could expose defendants to liability for claims that should have been time-barred.

VIII. WITHOUT SIGNED CONSENT FORMS, DEKALB COUNTY CANNOT KNOW THE IDENTITIES OF THE ACTUAL PLAINTIFFS TO THE TORNADO CLAIM.

Ultimately, without signed consent forms for the tornado claim, DeKalb County cannot know (without further needless, time-consuming discovery) which of the roughly 420 purported class members can or even want to be a plaintiff in this action. Further muddying the water is the acknowledged fact that some of the purported class members did not even work during the tornado period (and, thus, would have no claim for overtime under the tornado claim), and still more, like named Plaintiff Walter B. Johnson, are FLSA-exempt managerial employees who are not entitled to overtime, no matter what the circumstances. (App. F, 30a).

As Plaintiffs themselves previously have argued, one of the suggested purposes of § 216(b) is to prevent confusion regarding the identity of possible plaintiffs. *See Allen v. Atlantic Richfield*, 742 F.2d 1131, 1134-35 (5th Cir. 1984). Obviously, the best (and simplest) way to eliminate this problem is for class members to file consent forms as required by § 216(b). Such a procedure would eliminate all confusion regarding the identity of the plaintiffs and there is no reason why obtaining consent forms for later-added, unrelated claims is any more burdensome than obtaining the initial consent forms. In fact, such a requirement actually would save time and resources because it would eliminate much confusion and extra work concerning who

actually consented (or even had standing to consent) to be a plaintiff to later-added claims.

CONCLUSION

In reversing the District Court's dismissal of the class members, the Court of Appeals adopted a rule that violates the intent of the FLSA, will have the potential to improperly transform many FLSA class actions into Rule 23-like opt-out cases, will enable class members to avoid the statute of limitations, and will foster confusion and uncertainty concerning the identity of class member plaintiffs in many future cases. This Court instead should interpret the FLSA's opt-in provision to mean what it says – that class members must consent to *all* claims brought on their behalf, not just some. Such an interpretation is not onerous or burdensome to FLSA plaintiffs and will serve to protect the right of putative class members to refuse to consent to claims and to instead bring such claims themselves. As a result, and for the above reasons, Petitioner DeKalb County respectfully asks that this Court grant certiorari and reverse the judgment of the Court of Appeals.

Respectfully submitted,

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APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-11774
Non-Argument Calendar

D.C. Docket No. 97-03395-CV-TWT-1

CHRISTOPHER D. PRICKETT,
DONALD A. COX, et al.,
on behalf of themselves and all
members of the DeKalb County
Fire Department who
consent to representation,
JAMES K. ADAMS,
STIG T. AHLENIUS, et al.,

Plaintiffs-Appellants,

versus

DEKALB COUNTY,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(Filed November 5, 2003)

Before BLACK, CARNES and BARKETT, Circuit Judges.

PER CURIAM:

The named plaintiffs in this case, employees of the Fire Services Bureau of the DeKalb County Department of Public Safety, filed two claims against DeKalb County for overtime pay pursuant to the Fair Labor Standards Act of 1938, 29 U.S.C. § 201, *et seq.* The case became a class action when several hundred additional plaintiffs opted to join the named plaintiffs by filing consent forms with the court pursuant to 29 U.S.C. § 216(b). The named plaintiffs then filed a Federal Rules of Civil Procedure Rule 15(d) motion to supplement the complaint to assert a third FLSA claim. The district court granted that motion to supplement but subsequently granted summary judgment to the County as to all three claims. We affirmed the district court's dismissal of the first two claims, but vacated and remanded to the district court for further consideration of the third claim.

On remand, the district court granted the County's motion for summary judgment insofar as the opt-in plaintiffs were concerned on a new ground. The new ground was that the opt-in plaintiffs were not parties to the third claim, because they had not filed a new consent form after the original complaint had been amended to add that claim. The theory behind the grant of summary judgment is that those plaintiffs who opt in under § 216(b) are plaintiffs only as to claims before the court at the time they opted to join the action.

This is the named-plaintiffs' appeal of that grant of summary judgment on behalf of the opt-in plaintiffs. We review a district court's grant of summary judgment *de novo,* applying the same legal standards used by the district court. *See, e.g., Hilburn v. Murata Elecs. N. Am.,*

Inc., 181 F.3d 1220, 1225 (11th Cir. 1999). Summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). We "'view the evidence and all factual inferences therefrom in the light most favorable to the party opposing the motion,'" and "'[a]ll reasonable doubts about the facts [are] resolved in favor of the non-movant.'" *Burton v. City of Belle Glade*, 178 F.3d 1175, 1187 (11th Cir. 1999) (quoting *Clemons v. Dougherty County*, 684 F.2d 1365, 1368-69 (11th Cir. 1982)).

FLSA is a remedial statute that "'has been construed liberally to apply to the furthest reaches consistent with congressional direction.'" *Johnston v. Spacefone Corp.*, 706 F.2d 1178, 1182 (11th Cir. 1983) (quoting *Mitchell v. Lublin, McGaughy & Assocs.*, 358 U.S. 207, 211, 79 S. Ct. 260, 264 (1959)). It requires employers to pay one and one-half times the employee's regular rate of pay for hours worked in excess of forty hours per week. 29 U.S.C. § 207(a)(1). Employers who violate these provisions of the FLSA are "liable to the employee or employees affected in the amount of their . . . unpaid overtime compensation . . . and in an additional equal amount as liquidated damages." 29 U.S.C. § 216(b).

An FLSA action for overtime pay can be maintained by "one or more employees for and in behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b). However, prospective plaintiffs under FLSA must expressly consent to join the class, because § 216(b) contains this provision: "No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought."

Id. Because of this opt-in requirement, FLSA plaintiffs may not certify a class under Rule 23. *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1106 (11th Cir. 1996).

The district court in this case ruled that § 216(b) requires opt-in plaintiffs to submit new consent forms, i.e., that they opt in again, in order to be considered as plaintiffs in regard to any FLSA claim which was not in the complaint as it stood at the time they originally joined. The court's thinking was that opt-in plaintiffs do not join the action, but instead join specific claims within the action at the time they consent to become a plaintiff. This legal conclusion is not supported by the language of the statute, nor is it supported by any holding of this circuit or any other federal appeals court.

We are bound by the intent of Congress, as expressed in the language of the statute. The statute says, "[n]o employee shall be a party plaintiff to any such *action* unless he gives his consent in writing to become such a party. . . . " 29 U.S.C. § 216(b) (emphasis added). That plain language indicates that plaintiffs do not opt-in or consent to join an action as to specific claims, but as to the action as a whole. The statute does not indicate that opt-in plaintiffs have a lesser status than named plaintiffs insofar as additional claims are concerned. To the contrary, by referring to them as "party plaintiff[s]" Congress indicated that opt-in plaintiffs should have the same status in relation to the claims of the lawsuit as do the named plaintiffs.

Congress' purpose in authorizing § 216(b) class actions was to avoid multiple lawsuits where numerous employees have allegedly been harmed by a claimed violation or violations of the FLSA by a particular employer. *See De*

Asencio v. Tyson Foods, Inc., 342 F.3d 301, 306 (3d Cir. 2003) (discussing the legislative history of the Portal-to-Portal Act, which amended FLSA to add the class action provision in order to reduce the number of FLSA lawsuits being filed in federal court). That congressional intent would not be advanced by a requirement that new consents to join be submitted by opt-in plaintiffs, who may sometimes number in the hundreds, in order for them to remain as full-fledged plaintiffs. Those who fail to file written re-consents in time would be required to file new actions on their own behalf in order to assert any claims added by amendments to the complaint, and as a result, the number of lawsuits necessary to litigate the same end result would be multiplied. Absent indication that Congress wanted such an inefficient result – and here all the indication is that it did not – we will not adopt a rule that would bring it about.

Moreover, the language of the consent forms that the opt-in plaintiffs signed in this case indicates that they consented to have the named plaintiffs adjudicate all of their claims for overtime compensation under FLSA, not merely the claims then specified in the complaint. The consent form states:

> Consent to representation in action to secure rights under the fair labor standards act. I, [name], am an employee of the Fire Rescue Division of the DeKalb County Department of Public Safety. I hereby consent to have the named Plaintiffs in this case represent my interests in adjudicating my claims for overtime compensation and any other benefits, including liquidated damages, available under the [FLSA]. I agree and understand that said representative shall file this consent in support of my claims and I

> agree to the adjudication of my interests by said representative in the class action brought by the Plaintiff Representative.

The consent given was for the named plaintiffs to represent the interests of the employee in adjudicating all claims that employee had under the FLSA. That consent is broad enough to cover not only the claims then contained in the complaint but also any that might be added to it during the litigation. Added claims no less than initial claims are, in the language of the consent form, "my claims for overtime compensation and any other benefits, including liquidated damages, available under the FLSA."

For these reasons, the district court's order granting summary judgment to the County on the third claim insofar as the opt-in plaintiffs are concerned, because of their failure to file new consents after that claim was added to the complaint, is VACATED, and the case is REMANDED to the district court for further proceedings consistent with this opinion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CHRISTOPHER D. PRICKETT, et al., Plaintiffs, v. DEKALB COUNTY, et al., Defendants.	CIVIL ACTION FILE NO. 1:97-CV-3395-TWT

ORDER

(Filed Mar. 11, 2003)

This is an action brought by current and former Fire Services Bureau employees of the DeKalb County Department of Public Safety. They seek overtime compensation pursuant to the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.* ("FLSA"). The case is before the Court on the Plaintiffs' Motion for Reconsideration [Doc. 144] of the Court's Order granting in part the Defendant's Motion for Summary Judgment and the Plaintiffs' Motion for Continuance [Doc. 146].

I. BACKGROUND

Plaintiffs are five employees of the Fire Services Bureau of the DeKalb County Department of Public Safety. Defendant DeKalb County is a political subdivision of the State of Georgia. This action was filed by the five named Plaintiffs on November 10, 1997. They alleged that the County owed them additional overtime compensation.

Under federal law, local governments may elect to pay firefighters overtime only if they work more than 212 hours in a 28-day work period. FLSA, 29 U.S.C. § 207(k) (hereinafter referred to as the "7(k) exemption"). In the initial Complaint, the Plaintiffs alleged that the 7(k) exemption did not apply because their primary duty was not providing fire protection services, but rather emergency medical services. Plaintiffs also claimed that the FLSA entitles those firefighters with the rank of battalion chief or captain to the same overtime compensation rights as firefighters with lesser rank. Pursuant to 29 U.S.C. § 216(b), approximately 420 other DeKalb County firefighters filed written consents to representation by the Plaintiffs to assert claims for overtime compensation on their behalf.

On April 9, 1998, a tornado hit the Dunwoody area of DeKalb County, causing widespread damage. This damage required a vast effort from the DeKalb County Fire Department which required its firefighters to work extra hours in an effort to stem the damage caused by the tornado. In DeKalb County, firefighters typically work for 24 hours and then have the next 48 hours off (hereinafter referred to as the "24/48" schedule). (Wilder Aff. ¶ 16.) Shortly after the tornado struck, former DeKalb County Fire Chief Carlos Perez issued a memorandum which stated that, pursuant to the Alpha Bravo Emergency Recall Plan, all 24 hour shift personnel would be placed on a "40 hour work week/12 hour shifts." (Defendant's Ex. A.) By this, Perez meant that the firefighters would work for 12 hours and then have the next 12 hours off (hereinafter referred to as a "12/12 shift"). Accordingly, the firefighters worked the 12 hour ("12/12") shift schedule until Sunday, April 12, 1998, at which time Perez placed them on a "24 on/24 off" schedule (hereinafter referred to as the "24/24

shift") under which the firefighters were on duty for 24 hours and then had the next 24 hours off. (Defendant's Ex. B.) According to Perez, this 24/24 shift was to remain in effect until midnight Friday, April 17, 1988, at which time the firefighters were to return to their normal 24/48 work schedule. *Id.* On September 22, 1998, Plaintiffs filed a Supplemental Complaint in which they alleged that Perez's memo stating that they would be placed on a "40 hour work week/12 hour shifts" removed them from the 7(k) exemption and requires that they be paid overtime for all hours worked over 40 in a 7 day work period.

Following lengthy and contentious discovery, the Defendant moved for summary judgment on all of Plaintiffs' overtime claims. This Court held that the 7(k) exemption applied and that the battalion chiefs and captains were not entitled to overtime. As to the tornado claims, the Defendant argued that, because Perez clearly had no legal authority to reverse DeKalb County's valid adoption of the 7(k) exemption, whatever actions Perez is alleged to have taken could not have changed the firefighters' overtime status and that the firefighters, therefore, were entitled to overtime only if they worked more than 212 hours in a 28 day period. This Court agreed with Defendant and granted summary judgment as to Plaintiffs' tornado claims. (District Court Order, dated March 29, 2000, at 25-6 [Doc. 99] (hereinafter "District Court Order")). Based on arguments not made in this Court, on appeal the Eleventh Circuit ruled that this Court "erred in finding that then-Chief Perez's alleged lack of authority to make work schedule changes absolved Defendant of its responsibilities under the FLSA" and that "[t]here are therefore issues of material fact with respect to this claim." (Eleventh Circuit Order, dated May 3, 2001, at 8 [Doc. 111] (hereinafter

"Eleventh Circuit Order")). The District Court Order granting summary judgment to the Defendant on the applicability of the 7(k) exemption was affirmed. The Eleventh Circuit remanded the case back to this Court.

After unsuccessful settlement negotiations, the Defendant filed a second Motion for Summary Judgment [Doc. 133]. In the motion, the Defendant again argued that it was not liable for overtime due to the change in work schedule following the tornado disaster. It also argued that it was not liable for overtime to any Plaintiffs not named in the caption because those Plaintiffs had not consented to be represented in this action with respect to the tornado disaster claims. After the Court granted them two extensions of time to respond, the Plaintiffs filed their response to the Motion for Summary Judgment. With respect to the lack of consent argument, the Plaintiffs' response consisted of three short paragraphs in their 14 page brief. They stated that the Defendant's argument on this point was ridiculous and absurd and contrary to the liberal construction to be given to the Fair Labor Standards Act. Other than quoting the statute, 29 U.S.C. § 216(b), they cited no case law or authority. Left on its own, the undersigned researched what little law there is on the issue and concluded that *Haynes v. Singer Co., Inc.*, 696 F.2d 884 (11th Cir.1983) and *LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286 (5th Cir.1975) dictated granting the motion as to the unnamed Plaintiffs. In the Motion for Reconsideration, counsel for the Plaintiffs raise for the first time a laundry list of reasons why the Court committed "reversible error" in ruling in favor of the Defendant.

II. DISCUSSION

In the Motion for Reconsideration, the Plaintiffs argue for the first time that the Defendant failed to assert misjoinder of the consent Plaintiffs in its answer and has waived any contention that they are not properly before the Court; that some of the unnamed Plaintiffs (not identified by name) filed their consent forms after the tornado disaster; that the initial consent forms made the unnamed Plaintiffs "true" Plaintiffs; and that the tornado disaster claims were merely an alternative legal theory. The Brief in support of the Motion for Reconsideration is only one page shorter than the Plaintiffs' entire response to the Motion for Summary Judgment which raised numerous other issues. The Defendant objected to the Motion for Reconsideration on the grounds that it raised new arguments and new legal theories.

A motion for reconsideration should be reserved for certain limited situations, namely the discovery of new evidence, an intervening development or change in the controlling law, or the need to correct a clear error or prevent a manifest injustice. *Preserve Endangered Areas v. United States Army Corps of Engineers,* 916 F. Supp. 1557, 1560 (N.D. Ga. 1995). Because reconsideration may occur only in these limited circumstances, a party "may not employ a motion for reconsideration as a vehicle to present new arguments or evidence that should have been raised earlier, introduce novel legal theories, or repackage familiar arguments to test whether the Court will change its mind." *Brogdon v. National Healthcare Corp.,* 103 F. Supp. 2d 1322, 1338 (N.D. Ga. 2000); *Godby,* 1994 WL 470220 *1 ("A motion for reconsideration should not be used to reiterate arguments that have previously been

made . . . '[It is an improper use of] the motion to reconsider to ask the Court to rethink what the Court [has] already thought through – rightly or wrongly.'") (quoting *Above the Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983)) (alterations in original); *In re Hollowell*, 242 B.R. 541, 542-43 (Bankr. N.D. Ga. 1999) ("Motions for reconsideration should not be used to relitigate issues already decided or as a substitute for appeal . . . Such motions also should not be used to raise arguments which were or could have been raised before judgment was issued.").

The Court will not consider the new arguments made for the first time by the Plaintiffs in the Motion for Reconsideration. The Plaintiffs argue that they have been "sandbagged" by the Defendant. That argument may have had merit if it had been made in response to the Motion for Summary Judgment. But, it was not, and now, it is the Court that is being sandbagged. It would set the worst sort of precedent to allow a party to do what the Plaintiffs are trying to do here; that is, to make a token response to a motion and then when they lose to come out with all of the weighty reasons why they should have won. Allowing this would waste the Court's time and seriously disrupt the orderly and efficient management of the Court's pressing case load. The other grounds stated in the motion are addressed in the Court's Order. The Motion for Reconsideration should be denied.

III. CONCLUSION

For the reasons set forth above, the Motion for Reconsideration [Doc. 144] is DENIED. This case was scheduled to go to trial on March 10, 2003. For the reasons stated at

the pretrial conference on March 7, 2003, Plaintiffs' Motion for Continuance [Doc. 146] is GRANTED. The Plaintiffs' Motion for Entry of Final Judgment [Doc. 146] is GRANTED. There being no just reason for delay, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Clerk is directed to enter final judgment in favor of the Defendant against all Plaintiffs other than those named in the caption of the case. The Plaintiffs' Motion for Stay [Doc. 146] is GRANTED. This action is stayed pending the appeal of the judgment and the Court's Order [Doc. 142] granting in part the Defendant's Motion for Summary Judgment. The parties having consented thereto, all further proceedings in this action following the appeal will be conducted by the assigned Magistrate Judge.

SO ORDERED, this 10 day of March, 2003.

/s/ Thomas W. Thrash, Jr.
THOMAS W. THRASH, JR.
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CHRISTOPHER D. PRICKETT, et al., Plaintiffs, v. DEKALB COUNTY, Defendant.	CIVIL ACTION FILE NO. 1:97-CV-3395-TWT

ORDER

(Filed Feb. 4, 2003)

This is an action brought by current and former Fire Services Bureau employees of the DeKalb County Department of Public Safety. They seek overtime compensation pursuant to the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.* ("FLSA"). The case is before the Court on Motions for Summary Judgment [Doc. 133 & 138] filed by Plaintiffs and Defendant. For the reasons set forth below, the Court grants in part and denies in part Defendant's Motion for Summary Judgment and denies Plaintiffs' Motion for Summary Judgment as untimely.

I. BACKGROUND

Plaintiffs are five employees of the Fire Services Bureau of the DeKalb County Department of Public Safety. Defendant DeKalb County is a political subdivision of the State of Georgia. This action was filed by the five named Plaintiffs on November 10, 1997. They alleged that

the County owed them additional overtime compensation. Under federal law, local governments may elect to pay firefighters overtime only if they work more than 212 hours in a 28-day work period. FLSA, 29 U.S.C. § 207(k) (hereinafter referred to as the "7(k) exemption"). In the initial Complaint, the Plaintiffs alleged that the 7(k) exemption did not apply because their primary duty was not providing fire protection services, but rather emergency medical services. Plaintiffs also claimed that the FLSA entitles those firefighters with the rank of battalion chief or captain to the same overtime compensation rights as firefighters with lesser rank. Pursuant to 29 U.S.C. § 216(b), approximately 420 other DeKalb County firefighters filed written consents to representation by the Plaintiffs to assert claims for overtime compensation on their behalf.

On April 9, 1998, a tornado hit the Dunwoody area of DeKalb County, causing widespread damage. This damage required a vast effort from the DeKalb County Fire Department which required its firefighters to work extra hours in an effort to stem the damage caused by the tornado. In DeKalb County, firefighters typically work for 24 hours and then have the next 48 hours off (hereinafter referred to as the "24/48" schedule). (Wilder Aff. ¶ 16.) Shortly after the tornado struck, former DeKalb County Fire Chief Carlos Perez issued a memorandum which stated that, pursuant to the Alpha Bravo Emergency Recall Plan, all 24 hour shift personnel would be placed on a "40 hour work week/12 hour shifts." (Defendant's Ex. A.) By this, Perez meant that the firefighters would work for 12 hours and then have the next 12 hours off (hereinafter referred to as a "12/12 shift"). Accordingly, the firefighters worked the 12 hour ("12/12") shift schedule until Sunday April 12, 1998, at which time Perez placed them on a "24

on/24 off" schedule (hereinafter referred to as the "24/24 shift") under which the firefighters were on duty for 24 hours and then had the next 24 hours off. (Defendant's Ex. B.) According to Perez, this 24/24 shift was to remain in effect until midnight Friday April 17, 1988, at which time the firefighters were to return to their normal 24/48 work schedule. *Id.* On September 22, 1998, Plaintiffs filed a Supplemental Complaint in which they alleged that Perez's memo stating that they would be placed on a "40 hour work week/12 hour shifts" removed them from the 7(k) exemption and requires that they be paid overtime for all hours worked over 40 in a 7 day work period.

Following lengthy and contentious discovery, the Defendant moved for summary judgment on all of Plaintiffs' overtime claims. This Court held that the 7(k) exemption applied and that the battalion chiefs and captains were not entitled to overtime. As to the tornado claims, the Defendant argued that, because Perez clearly had no legal authority to reverse DeKalb County's valid adoption of the 7(k) exemption, whatever actions Perez is alleged to have taken could not have changed the firefighters' overtime status and that the firefighters, therefore, were entitled to overtime only if they worked more than 212 hours in a 28 day period. This Court agreed with Defendant and granted summary judgment as to Plaintiffs' tornado claims. (District Court Order, dated March 29, 2000, at 25-6 [Doc. 99] (hereinafter "District Court Order")). However, on appeal the Eleventh Circuit ruled that this Court "erred in finding that then-Chief Perez's alleged lack of authority to make work schedule changes absolved Defendant of its responsibilities under the FLSA" and that "[t]here are therefore issues of material fact with respect to this claim." (Eleventh Circuit Order, dated May 3, 2001, at 8

[Doc. 111] (hereinafter "Eleventh Circuit Order")). The District Court Order granting summary judgment to the Defendant on the applicability of the 7(k) exemption was affirmed. The Eleventh Circuit remanded the case back to the District Court. Both the Plaintiffs and DeKalb County have now filed Motions for Summary Judgment. Those motions are the subject of this Order.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate only when the pleadings, depositions, and affidavits submitted by the parties show that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The court should view the evidence and any inferences that may be drawn in the light most favorable to the nonmovant. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158-159 (1970). The party seeking summary judgment must first identify grounds that show the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). The burden then shifts to the nonmovant, who must go beyond the pleadings and present affirmative evidence to show that a genuine issue of material fact does exist. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986).

III. DISCUSSION

A. Plaintiffs' Motion for Summary Judgment

The deadline for filing motions for summary judgment in this action was July 1, 2002. (District Court Order, dated June 20, 2002 [Doc. 132].) The Plaintiffs did not file a motion for summary judgment by the deadline. Plaintiffs filed their brief in opposition to Defendant's motion for

summary judgment and brief in support of a cross motion for summary judgment on August 12, 2002. Thus, pursuant to Local Rule 56.1.C, Plaintiffs' motion for summary judgment is untimely and should be dismissed. The Court will consider Plaintiffs' brief as a brief in opposition to Defendant's motion for summary judgment.

B. Consent to Representation

Section 16(b) of the FLSA states that "[a]n action to recover . . . liability . . . may be maintained against any employer . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b). Unlike class actions brought pursuant to Rule 23 "no employee shall be a party plaintiff to any such action unless he gives consent in writing to become such a party and such consent is filed in the court in which such action is brought." *Id.* Without such written consent, "no person can become a party plaintiff and no person will be bound by or may benefit from a judgment." *Haynes v. Singer Co., Inc.*, 696 F.2d 884, 886 (11th Cir. 1983). The Fifth Circuit in *LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286 (5th Cir. 1975)[1] elaborated on the purpose and effect of this statutory provision. The court stated:

> There is a fundamental, irreconcilable difference between the class action described by Rule 23 and that provided for by FLSA § 16(b). In a Rule

[1] In *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1207 (11th Cir.1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions the former Fifth Circuit rendered prior to the close of business on September 30, 1981.

> 23 proceeding a class is described; if the action is maintainable as a class action, each person within the description is considered to be a class member and, as such, is bound by the judgment, whether favorable or unfavorable, unless he has 'opted out' of the suit. Under § 16(b) of FLSA, on the other hand, no person can become a party plaintiff and no person will be bound by or may benefit from judgment unless he has affirmatively 'opted into' the class; that is, given his written, filed consent.

Id. at 288.

In the instant action, at the time the Plaintiffs filed their consent forms, the class members could not consent to the "tornado claim" specifically because the tornado crisis had not yet occurred. The Complaint was later amended to include the "tornado claim." No class member has filed an additional consent form since the tornado claim was added. Further, the only claim remaining in the action is the tornado claim. The Court has dismissed all the claims that did exist at the time the class members filed their consent forms.

Defendant contends that the tornado claim is wholly separate and unrelated to the claims for which the class members consented to representation. They argue that the fact that the Plaintiffs chose to amend an existing complaint to add this tornado claim should not relieve them of the obligation to gain consent of class members to bring this action on their behalf. Defendant maintains that the FLSA's opt-in provision should be interpreted to mean that if a plaintiff wishes to bring a class action for a particular claim, then the putative class members must consent to representation for that claim, not for some other unrelated

claim. Defendant asserts that no class member filed a consent form for the only claim left in this lawsuit. Plaintiffs argue that class members did not need to file consent forms for the new tornado claims because these class members previously filed consent forms authorizing the named plaintiffs to represent them in the action which includes other unrelated claims. Section 216(b) does not state that employees who have already filed consent forms, and therefore already become plaintiffs, must file new and separate consent forms as new claims arise. Furthermore, the FLSA must be given a liberal construction in favor of the employee. *H.B. Zachry Co. v. Mitchell,* 262 F.2d 546, 549 (5th Cir. 1959).

On the other hand, the Court is bound to following the teaching of *LaChapelle* that Rule 23 class actions are not permissible in FLSA cases. The claims arising out of the tornado disaster are completely separate, independent and unrelated to the claims originally asserted in the Complaint. Allowing the named Plaintiffs to assert these claims on behalf of others, in essence, allows them to pursue a Rule 23 class action as to those claims. The action would proceed without the procedural protections of Rule 23, including the right to opt out under Rule 23(c), or the necessity to opt in under Section 16(b) of the FLSA. Notwithstanding the remedial nature of the FLSA, such an outcome is completely at odds with the 1947 amendments to the FLSA. "The 1947 amendment eliminated the agent or representative type action and, although it retained the class action, it specifically required that all employees wishing to have their rights adjudicated 'opt in' as parties plaintiff." *LaChapelle,* 513 F.2d at 287, n. 6. The unnamed Plaintiffs have not shown that they wish to have their rights adjudicated in this action by opting in for the

tornado disaster claim. They opted in to an action challenging the 7(k) exemption; this is a completely separate and unrelated action. Therefore, the Defendant's motion for summary judgment should be granted as to any claims other than those of the five named Plaintiffs.

C. Tornado Disaster Overtime Claims

The FLSA generally requires employers to compensate employees at the overtime rate (time and one-half) for all work performed in excess of 40 hours per week. 29 U.S.C. § 207(a); *Birdwell v. City of Gadsden, Ala.*, 970 F.2d 802 (11th Cir. 1992). An exception to this rule is found in Section 7(k) which provides:

> No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of any employee in fire protection activities . . . if (1) in a work period of twenty-eight (28) consecutive days the employee receives for tours of duty which in the aggregate exceed . . . [212 hours] . . . compensation at a rate of not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 207(k); *Birdwell*, 970 F.2d at 804.

The Eleventh Circuit, in its May 3, 2001 Order, held that, "[a]ssuming that then-Chief Perez was not authorized by statute to alter Plaintiffs' work schedule during the tornado disaster of April 1998, [the County] is still required to pay overtime for those hours worked in excess of forty hours per week." The Eleventh Circuit went on to state that "Defendant thus cannot claim that it is not responsible for then-Chief Perez's change in Plaintiffs' work schedule." Finally, it held that

> The district court thus erred in finding that then-Chief Perez's alleged lack of authority to make work schedule changes absolved Defendant of its responsibilities under the FLSA. There are therefore issues of material fact with respect to this claim, and summary judgment was inappropriate.

(Eleventh Circuit Order, May 3, 2001, at 8.)

Under the FLSA, the term "work period" refers to the pay period, not the actual hours or shifts worked by employees. 29 U.S.C. § 207(k); 29 C.F.R. § 553.224. Thus, the term "work period" in section 7(k) of the FLSA refers to the 28 day pay period, not the day-to-day shifts or work schedules of employees. *Id.* To the contrary, Section 7(k) says nothing about work shifts or work schedules, and there is nothing in the FLSA which states that firefighters must work a certain schedule to qualify for the 7(k) exemption. In fact, it is undisputed that DeKalb County paid the Plaintiffs all overtime due, under Section 7(k) of the FLSA, as a result of Chief Perez's change in "work schedule."

The issue is whether there was also a change in the "work period" that took the firefighters out of the Section 7(k) exemption. The Defendant says that there was no such change, but the Court cannot agree without violating the mandate of the Eleventh Circuit. Therefore, the Court will interpret the Eleventh Circuit's usage of the term "work schedule" as actually meaning "work period." Thus, the Eleventh Circuit held that then-Chief Perez did in fact alter the "work period" not "work schedule." By doing so, the Eleventh Circuit held that Chief Perez modified Plaintiffs' "work period" from the previously applicable 28 day "work period" to one not recognized by Section 7(k)

and implemented a new "work period" of a "40 hour work week" for the work week prior to midnight on April 17, 1998. After that, the firefighters returned to their normal work schedule, *i.e.,* 24/48 with a 28 day work period, according to Chief Perez's April 11, 1998 memorandum. (Defendant's Ex. B.) Therefore, this case will proceed to trial on the question of the amount of overtime due to the named Plaintiffs for the hours, if any, worked in excess of 40 hours for the altered pay period.

D. Liquidated Damages

Under 29 U.S.C.A. § 216(b), affected employees shall recover liquidated damages from their employer for violations of the FLSA. An employer may avoid the mandatory nature of an award of liquidated damages if the court chooses not to make an award where the employer shows its actions were in good faith and shows it had reasonable grounds for believing that those actions did not violate the FLSA. 219 U.S.C. §§ 216(b) and 260; *Glenn v. General Motors Corp.,* 841 F.2d 1567, 1573 (11th Cir. 1988). 29 C.F.R. § 790.22 provides that:

> (a) . . . in any action brought under the [FLSA] to recover unpaid . . . overtime compensation . . . the court may, subject to prescribed conditions, in its sound discretion award no liquidated damages . . . (b) the conditions prescribed as prerequisites to such an exercise of discretion are two: (1) the employers must show to the satisfaction of the court, that the act or omission giving rise to such action was in good faith; and (2) he must show also, to the satisfaction of the court, that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA]. If these conditions are met by the employer against

> whom the suit is brought, the court is permitted, but not required, in its sound discretion, to reduce or eliminate the liquidated damages which would otherwise be required.

Defendant's Motion for Summary Judgment on this issue is premature. Only after a finding of liability has been reached does the Court reach the issue of liquidated damages. The Court has no discretion at the outset. The finding of a violation of the FLSA necessitates an award of liquidated damages. Only if the Defendant then succeeds in persuading the Court on the Section 790.22 factors does the Court then have discretion to either award or decline an award of liquidated damages. *Glenn,* 841 F.2d at 1573. Because no liability has been determined in the instant action, Defendant's Motion for Summary Judgment on the issue of liquidated damages is denied.

IV. CONCLUSION

For the reasons set forth above, Defendant's Motion for Summary Judgment [Doc. 133] is GRANTED IN PART AND DENIED IN PART and Plaintiffs' Motion for Summary Judgment [Doc. 138] is DENIED.

SO ORDERED, this 4 day of February, 2003.

/s/ Thomas W. Thrash, Jr.
THOMAS W. THRASH, JR.
United States District Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 03-11774-CC

CHRISTOPHER D. PRICKETT,
DONALD A. COX,
ROBERT L. ROBERTSON,
JOSEPH M. HINES,
WALTER B. JOHNSON,
on behalf of themselves and all
members of the DeKalb County
Fire Department who consent
to representation,
JAMES K. ADAMS, et al.,

Plaintiffs-Appellants,

versus

DEKALB COUNTY,

Defendant-Appellee.

On Appeal from the United States District Court for the
Northern District of Georgia

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

(Opinion ___, 11th Cir., 19___, ___F.2d___).

(Filed Jan. 12, 2004)

Before BLACK, CARNES and BARKETT, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Ed Carnes
UNITED STATES CIRCUIT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CHRISTOPHER D. PRICKETT, et al., Plaintiffs, vs. DEKALB COUNTY, et al., Defendants.	CIVIL ACTION FILE NO. 1:97-CV-3395-TWT

Deposition of BRUCE FRANK KOSHKIN, taken on behalf of the Defendants, in accordance with the Federal Rules of Civil Procedure, pursuant to agreement of counsel, before Debera J. Puckett, Certified Court Reporter, at Suite 2600, 75 Fourteenth Street Atlanta, Georgia, on the 12th day of April, 1999, commencing at the hour of 10:00 a.m.

* * *

Q (By Mr. Capobianco) I am handing you what the court reporter has marked as Defendants' Exhibit 166.

Could you identify that, please.

A It's my consent to representation is this action.

Q Is that your signature at the bottom of the page?

A Yes, sir, it is.

Q Do you remember when you signed that?

A This was – no, sir, exact date, no, sir, I can't. It was approximately a year ago. I don't recall the exact date on it.

Q Are you aware that the complaint was amended in this case to include allegations concerning pay regarding time worked during the tornado aftermath in 1998?

A I didn't that – no, sir, I didn't know it was part of the lawsuit. I had heard rumors. I didn't know officially that it was.

* * *

APPENDIX F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CHRISTOPHER D. PRICKETT, DONALD A. COX, ROBERT L. ROBERTSON, JOSEPH M. HINES, WALTER B. JOHNSON, on behalf of themselves and all members of the DeKalb County Fire Department who consent to representation,	*	CIVIL ACTION FILE NO. 1 97-CV-3395
Plaintiffs,	*	FAIR LABOR STANDARDS ACT CLASS ACTION
vs.	*	(Filed Nov. 10, 1997)
DEKALB COUNTY, THOMAS BROWN, in his official capacity as Director of the DeKalb Public Safety Department (DPS); and CARLOS E. PEREZ, Chief of the Fire Rescue Division of DPS,	*	
Defendants.	*	

COMPLAINT

COMES NOW the Plaintiffs and assert their claims under the Fair Labor Standards Act [hereinafter FLSA] for overtime compensation, liquidated damages and reasonable expenses of litigation, including attorneys' fees, on the grounds set forth below:

JURISDICTION AND VENUE

1.

The jurisdiction of this Court is invoked under 28 U.S.C. §1331 and §1337. This Court also has jurisdiction pursuant to 29 U.S.C. §216(b).

2.

Pursuant to 28 U.S.C. §1391, venue is appropriate in this judicial district as the Defendants reside here and the claim arose here.

PARTIES

3.

Plaintiffs Driver Engineer Christopher D. Prickett, Fire Fighter Donald A. Cox, Lt. Robert L. Robertson, Capt. Joseph M. Hines, and Battalion Chief Walter B. Johnson are presently employees of DeKalb County, in the Fire and Rescue Division of the DeKalb County Department of Public Safety [hereinafter FRD]. They work a recurring shift schedule of twenty-four (24) continuous hours on duty followed by forty-eight (48) hours off duty.

4.

The named Plaintiffs bring this action on behalf of themselves and all other similarly situated employees who consent to the representation, pursuant to 29 U.S.C. §216(b). The individual Plaintiffs consent to serve as the employee representatives is incorporated herein as Exhibit "A-1" through "A-5".

5.

Defendant DeKalb County [hereinafter "the County"] is a political subdivision of the State of Georgia subject to the jurisdiction of this Court. The County is an employer within the meaning of the FLSA, and operates the Department of Public Safety [hereinafter DPS]. The County may be served with process via the Chief Executive Officer, Liane Levetan, at her business address of 1300 Commerce Drive, Decatur, Georgia 30030.

6.

Defendant Thomas Brown is the Director of the Department of Public Safety, which operates the FRD. He is authorized by law to administer the affairs of the DPS, and is an employer within the meaning of the FLSA. Defendant Brown is sued in his official capacity and is subject to the jurisdiction of this Court. He may be served with process at his business address of 3630 Camp Circle, Decatur, Georgia 30032.

7.

Defendant Carlos E. Perez is the Chief Officer within the FRD. Defendant Perez is sued in his official capacity and is subject to the jurisdiction of this Court. He may be served with process at his business address of 3630 Camp Circle, Decatur, Georgia 30032.

8.

The named Plaintiffs have been specifically authorized to bring this action on behalf of other similarly situated past and present employees of the FRD. The written authorizations of such employees have been collectively filed in this action, and are incorporated by this reference as if attached. Each authorization expressly

consents to this suit and grants this Court the authority to adjudicate each individual's claim. Said authorizations may from time to time be supplemented as other similarly situated individuals "opt-in" to this litigation, pursuant to 29 U.S.C. §216(b).

FACTUAL ALLEGATIONS

9.

This action is brought by past and present employees of the FRD against the above-named Defendants for violation of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §201 *et seq.* [hereinafter "the FLSA" or the "Act"], based upon the Defendants' failure to properly compensate certain FRD employees for overtime worked and earned. It is brought on behalf of other similarly situated past and present FRD employees, pursuant to the express authority of those individuals. These written consents to "opt-in" by class members have been filed contemporaneously with this Complaint, and will continue to be submitted as they are executed and received by Plaintiffs' counsel.

10.

Upon information and belief, there are approximately 500 employees in the FRD.

11.

Plaintiffs and the members of the class they represent are employees engaged in an occupation directly essential to the protection of goods. Their activities safeguard the continuity of production and protect the stream of commerce against interruption. Such persons are therefore employees engaged in the production of goods for commerce

as defined by 29 U.S.C. §203(j). They are expressly covered by the protections of the FLSA, 29 U.S.C. §207(a).

12.

Employees of the FRD holding ranks up to and including Lieutenant are employees the Defendant County considers to be entitled to overtime compensation within the meaning of 29 U.S.C. §203(e), and each such employee is therefore entitled to the protections of the FLSA.

13.

On February 19, 1985, the United States Supreme Court in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), overruled *National League of Cities v. Usury*, 426 U.S. 833 (1976), making the FLSA directly applicable to governmental employees. Since February 19, 1985, the Defendants knew or should have known that the FLSA applies to Plaintiffs and the Plaintiff class members. Defendants have refused to adequately compensate Plaintiffs for overtime worked since that date, and have willfully refused to rectify the situation despite the demands of Plaintiffs, the admissions of Defendant Chief Perez and the advice of their own counsel not to rely on the §207(k) exemption. Defendants' conduct constitutes a willful violation of the FLSA, entitling Plaintiffs to backpay and liquidated damages, as allowed by law.

14.

Plaintiffs are required to work 24 hour shifts every third day based upon a twenty eight day work period, alternating 24 hours "on duty" and 48 hours "off duty".

15.

Defendants have compensated FRD employees holding the ranks of Lieutenant and below under a partial exemption from the overtime provisions of the FLSA. Under 28 U.S.C. §207(k), fire protection personnel may be required to work up to 212 hours in a 28 day tour of duty before earning overtime compensation. This exemption is authorized only for employees primarily engaged in fire protection activities, as defined in 29 C.F.R. §553.210.

16.

Plaintiffs holding the rank of Firefighter, Driver-Engineer, and Lieutenant who work a 24/48 hour shift are on continuous active duty at their assigned stations. Their time is spent explicitly for the benefit of their employer. Plaintiffs are unable to devote their time to purely personal business. As a condition of employment, they are required to work twenty four (24) hour shifts, and are required to sign in and out as they come and go from the station. Plaintiffs have no discretion in the hours they work, the calls they answer or in the scope and fulfillment of their job functions. The Defendants consider them non-exempt employees entitled to overtime compensation.

17.

Plaintiffs holding the rank of Captain and Battalion Chief and assigned to suppression/station duty on a 24/48 hour shift are required to report at a specific hour and leave at a specific hour. Their time is spent explicitly for the benefit of Defendants. Plaintiffs are unable to devote their time to purely personal business. As a condition of employment, they are required to work twenty four (24) hour shifts and to sign in and out or otherwise notify Defendants or their agents of their whereabouts at all

times during the shift. Plaintiffs have no discretion over the hours worked, or the scope and manner in which they fulfill their job duties. The Defendants consider persons holding the rank of Captain or Battalion Chief exempt from the overtime compensation obligations under the FLSA.

18.

Fire protection personnel who devote more than twenty percent (20%) of their duty time to work that does not qualify as fire protection may not be denied overtime under the partial exemption for fire protection personnel contained in §207(k) of the FLSA.

19.

Defendant Perez has admitted the 24/48 hour shift employees of the FRD exceed the twenty percent (20%) limitation on duties that do not qualify as fire protection service. Defendant Perez admitted this fact in a letter dated July 11, 1997, to Joan Mellor, a copy of which is attached as Exhibit "B":

> "We, like many other fire departments who respond to EMS calls, have a call volume this area that is already exceeding 20%."
>
> "Therefore, our County Attorney has made the recommendation that we not use the 7(k) exemption. An . . . option from our attorney is to discontinue answering EMS calls. This would be a great public concern and place our citizens at risk for emergency services. As a result *we do not intend* to pursue [that] option." (Emphasis added).

20.

The FRD has become an integral part of the Defendant Conley's emergency medical service response team. As stated by Assistant Fire Chief William C. Lewis in a memo entitled "EMS Issues" to all FRD employees dated October 16, 1997, a copy of which is attached as Exhibit "C":

> "It has become *normal* [for FRD] to respond to calls without EMS assistance due to call volume and the "stacking" of calls resulting in no units available. This situation, called NAATT (no available ambulances at this time) has been occurring two to three times daily.
>
> We as first responders should be proud of the service we give our customers and *without us, no system of emergency medical care can survive.*" (Emphasis added).

21.

Defendants do not compensate Plaintiffs for time worked in excess of 40 hours per week on a basis of one and one-half times the regular rate of pay at which they are employed.

22.

Defendants have failed to meet the requirements for any of the exemptions from application of the overtime compensation requirements of the Fair Labor Standards Act under 29 U.S.C. §207.

23.

Defendants are liable for compensation for any and all time worked in excess of 40 hours per week at the rate of at least one and one-half times the regular rate.

CLAIMS FOR RELIEF

24.

Paragraphs 1 through 23 are incorporated herein by this reference.

25.

Defendants' failure to compensate Plaintiffs for time worked in excess of 40 hours per week on a basis of one and one-half times the regular rate of pay is a violation of §207 of the Fair Labor Standards Act of 1938, as amended. Such violation is intentional and willful, as Defendants knowingly have failed to meet the standards for qualifying Plaintiffs as *bona fide* fire protection employees under 29 C.F.R. §553.210 and 553.215. Said violation gives rise to a claim for relief under the FLSA for Plaintiffs for unpaid overtime compensation for three years prior to the filing of this Complaint, liquidated damages in an amount equal to the unpaid compensation, declaratory and injunctive relief, and reasonable attorneys fees and expenses of litigation, pursuant to 29 U.S.C. §216.

26.

Defendants have unlawfully designated employees assigned to 24/48 hour shifts who hold the rank of Captain and Battalion Chief as exempt from overtime compensation under the FLSA due to the supervisory and administrative responsibilities. These Plaintiffs are entitled to non-exempt status and to overtime compensation calculated either the §207(k) exemption, or under the 40 hour work week sought herein.

WHEREFORE, the Plaintiffs request this Court:

(a) Take jurisdiction of this matter;

(b) Permit this case to proceed as an FLSA class action under 29 U.S.C. §216 for those employees, past or present, who opt to participate by filing proper written notice with the Court;

(c) Grant a trial by jury as to all matters properly triable to a jury;

(d) Award the Plaintiffs payment for each overtime hour worked in the three years preceding the filing of this Complaint, calculated at one and one-half times the normal rate, and liquidated damages equalling 100% of overtime due each class member, as required by the FLSA;

(e) Award the Plaintiff members prejudgment interest on all amounts owed;

(f) Issue a declaratory judgment that Plaintiffs are covered by the provisions of the FLSA and that Defendants have failed to comply with the requirements of the FLSA;

(g) Issue preliminary and permanent injunctions directing the Defendants to comply with the provisions of the FLSA and preventing Defendants from reducing the pay of Plaintiffs to offset Defendants' overtime liability;

(h) Award Plaintiffs their attorney's fees and costs; and

(i) Award any other such further relief this Court deems just, equitable and proper.

This 10th day of November, 1997.

/s/ A. Lee Parks
A. LEE PARKS
State Bar No. 563750

/s/ Harlan S. Miller
HARLAN S. MILLER
State Bar No. 506709

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APPENDIX G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CHRISTOPHER D. PRICKETT, ET AL,	*	CIVIL ACTION FILE NO. 1:97-CV-3395-TWT
Plaintiffs,	*	FAIR LABOR STANDARDS ACT CLASS ACTION
vs.	*	
DEKALB COUNTY, ET AL	*	
Defendants.	*	

PLAINTIFFS' FIRST SUPPLEMENTAL COMPLAINT

COMES NOW the Plaintiffs in the above-referenced action and file this first supplemental complaint based upon the facts and allegations set forth below:

1.

Each and every paragraph of Plaintiffs' initial Complaint is incorporated herein by this reference.

2.

On or about April 7, 1998, Defendant Carlos E. Perez, Chief of Fire Services, caused a memorandum to be issued to all Fire Services Personnel placing all twenty-four (24) hour shift personnel on a forty hour work week to work daily twelve (12) hour shifts with all liberty days canceled. This shift change was necessitated by the declared emergency in the North DeKalb area that resulted from tornado strikes on or about the

morning of April 9, 1998. A true and correct copy of said memorandum is attached hereto as Exhibit "1".

3.

On April 11, 1998, Defendant Carlos E. Perez, Chief of the Fire Services, issued another memorandum to all fire services personnel requiring them to work a twenty-four (24) hour on/twenty-four (24) hour off shift schedule beginning Sunday, April 12, 1998 through midnight Friday, April 17, 1998. All leave and liberty days were canceled throughout the period. All personnel continued to be carried on a forty hour work week through end of this emergency period. A true and correct copy of this memorandum is attached hereto as Exhibit "2".

4.

DeKalb County delegated the authority to establish work schedules to its Chief of Fire Services. Defendant Perez did so after informing the Director of Public Safety. The altered work week affected all Fire Services personnel such that overtime was required to be paid based upon a forty hour work week. This natural disaster required the County change the schedule of all Fire Services Personnel which, in turn, required overtime compensation to be paid for all hours worked over forty during a prescribed work week.

5.

Defendant Carlos E. Perez, as Chief of Fire Services, authorized said overtime compensation with the knowledge and approval of Thomas Brown, the Director of Public Safety. However, the Defendant DeKalb County has failed and refused to pay said overtime compensation despite the fact that it was authorized

and all Fire Services Personnel worked virtually non-stop for over a week to assist County citizens who were victimized by the tornado strikes on or about April 9, 1998.

6.

The refusal of the Defendant DeKalb County to compensate the Plaintiff firefighters for all overtime worked during the period of time where this emergency schedule was implemented constitutes a willful violation of the Fair Labor Standards Act entitling the Plaintiffs to back overtime compensation and liquidated damages in an amount equal to the overtime compensation owed to each Plaintiff together with the reasonable attorneys fees and expenses of litigation incurred in having to seek these monies through Court proceedings.

WHEREFORE, the Plaintiffs respectfully request that the Court provide it the following relief in connection with this supplemental complaint:

(a) that the Court require the Defendants to respond to the supplemental complaint;

(b) that the Plaintiffs recover all of the compensation earned based upon the forty hour work week during the period of time the emergency schedule was in place in April of 1998;

(c) that the Plaintiffs be awarded liquidated damages in an amount equal to the unpaid overtime compensation sought by way of this supplemental complaint;

(d) Plaintiffs have trial by jury on the allegations set forth in their supplemental complaint;

(e) that the Plaintiffs recover their reasonable attorneys fees and expenses of litigation of having to pursue this matter through a Court of law; and

(f) that the Plaintiffs receive all other relief which is just, equitable and proper.

This 28 day of July, 1998.

/s/ A. Lee Parks
A. LEE PARKS
State Bar No. 563750

/s/ Harlan S. Miller
HARLAN S. MILLER
State Bar No. 506709

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